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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 760

VILLAGE OF MAYWOOD, a municipal corporation,
Petitioner,

vs.

ILLINOIS COMMERCE COMMISSION and
NORTHERN ILLINOIS GAS COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

Petitioner prays that a Writ of Certiorari issue to review a judgment of the Supreme Court of Illinois, entered on the 30th day of November, 1964.

OPINIONS AND ORDERS BELOW.

The Illinois Commerce Commission on June 25, 1957, in cause No. 43553, issued an order which added to the gas bills of the residents of the Village of Maywood, Cook County, Illinois, three per cent (3%) of the gross bill, "which shall enable the Company to recover from such customers the amount paid to the municipality as compensaton under the franchise ordinance." (Abst. 7)

The Supreme Court of Illinois affirmed the order on November 30, 1961. Its opinion is appended hereto (*infra*, pp. 5a-11a). The opinion has been published. *Village of Maywood* v. *Illinois Commerce Commission*, 23 Ill. 2d 447; 178 N.E. 2d 345.

STATEMENT OF JURISDICTION

The order of the court below affirming the commission's order was issued on November 30, 1961. This petitioner did not apply for a rehearing nor has it applied for an extension of time to file this petition.

The jurisdiction of this Court is invoked pursuant to statute, 28 USCA 1257(3).

The Village of Maywood raised the question of the impairment of the obligation of contract in its brief below:

> "What the company in fact seeks to do, is alter the basic provisions of the contractual relationship with the Village. Having gained the advantages of the franchise contract the Company now seeks to evade responsibility for the consideration involved by passing this burden along to the Maywood consumers. The orders of the Commission and the Circuit Court thus in fact abet the company in its design to impair the contract entered into in good faith by the Village and company's predecessor some sixty years ago. They would alter that contract to the extent of making the consumers of Maywood the unwitting victims of an undeserved windfall for the company."

It raised the question of unjust and unreasonable discrimination before the Commission in its petition for rehearing (R. 662). The Company, however, took the position that it was honoring the contract, even though

it was passing its franchise payments on to the residents, for whose benefit the contract was made (Abst. 31).

The court below ignored the question limiting its holding to the issue of discrimination. "[A] rate is unjust when it does not impose the burden of franchise payments on users in the community which receives the payments" (*infra*, p. 10a).

This frustration of company equivocation (admitting the contract and evading its obligation) and the court below upholding this discriminatory burden on the residents, does not lessen or obscure the essential federal question that the Commission's order impaired the obligation of this contract.

QUESTION PRESENTED.

Whether a public utility may succeed to the benefits of a franchise ordinance, by being the monopoly supplier of services, and evade the obligation of franchise payments to the municipality, by passing them on to the residents of the municipality as percentage rate increases which "enable the company to recover from such customers the amount paid to the municipality as compensation under the franchise ordinance" (Abst. 7), without impairing the obligation of the contract between the Village and the company.

CONSTITUTIONAL PROVISION INVOLVED

This petition involves that portion of Article I, Section 10 of Clause 1 of the Constitution of the United States which forbids the impairment of the obligation of a contract. That section reads in part as follows: "No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *."

STATEMENT OF THE CASE

The facts are not in dispute, and they are as follows:

The Respondent, Northern Illinois Gas Company (hereinafter referred to as "the company") on August 31, 1955, filed its Standard Contract Rider 7, Municipal Compensation Adjustment which was designated as Original Sheet No. 27, Ill. C.C. No. 9, with the Illinois Commerce Commission (Abst. 19). Under this rider the gas rates in the Villages of Maywood, Bellwood and Melrose Park would have been increased by an amount of 3%. The company was required at that time to pay to each of the Villages an amount equal to three per cent of its revenues for gas furnished to residents therein by virtue of individual franchise ordinances granted to the predecessors of the company and assigned and accepted by the Northern Illinois Gas Company.

The Bellwood franchise ordinance was granted to the Northwestern Gas Light & Coke Company, November 18, 1903, the Maywood ordinance was granted to The Municipal Gas Company, November 22, 1900 (Abst. 99), and the Melrose Park franchise was given to the same company on August 12, 1901. Payments to the municipalities commenced approximately 21 years after the passage of the respective ordinances and none of the ordinances had termination dates (Abst. 87-98).

After the proposed compensation rate was suspended, hearings were had in Chicago commencing on October 4, 1955. The Villages of Maywood, Bellwood and Melrose Park appeared as intervenors in opposition to the proposed compensation rate.

Subsequently the company by making lump sum payments to the municipalities of Bellwood and Melrose Park effected a settlement whereby the franchise ordinances of those two communities requiring payment by the company of three per cent of its gross receipts therein were eliminated and new franchises eliminating any such payments were adopted (Abst. 72). The company on July 16, 1956, moved to withdraw their proposed schedule. Pursuant to the Stipulation of the company and the Village of Maywood (Abst. 69) the Commission entered its order of July 16, 1956, dismissing Revised Sheet No. 1 and Original Sheet No. 27 of Ill. C.C. No. 9, filed August 31, 1955, and permitting all testimony, rulings, exhibits and briefs to be incorporated in any proceedings applicable to a new filing made by the company.

On July 26, 1956, the company filed with the Commission a revised rider designated "Municipal Compensation Adjustment, Schedule G, Ill. C.C. No. 9 Original (Revised) Sheet No. 27." The proposed rider calls for increasing the rates by a percentage to enable the company to recover an amount paid to the municipality as compensation under a franchise ordinance. The rider is applicable only to the Village of Maywood and calls for an additional charge of 3% (Abst. 13). On August 16, 1956, the Commission docketed the proposed rider as cause No. 43553 and suspended the proposed rate (Abst. 15) (Ill. Rev. Stat. 1957, Ch. 111⅔, §§ 1-95).

Thus, only the franchise of the Village of Maywood and the proposal of the company to add an additional three per cent to the bills of all its customers resident in the Village was in issue. The evidence indicates that the estimated payment by the company to the Village of Maywood in 1955 under the franchise was $24,720 (Abst.

83). For the year ending August 31, 1955, the gross receipts of the company were $67,491,198 (Abst. 46). The total payment to the three Villages in 1955 was estimated at $55,000 (*id.*). After taking into account additional payments in state utility taxes, additional billing expenses, losses due to assessing against the net rather than the gross bill and additional federal income taxes, it was estimated that the additional net income for the company from the elimination of payments in the *three* Villages of Maywood, Bellwood and Melrose Park would be approximately twenty-three thousand dollars (Abst. 49). This additional income from the three Villages would represent about 1/42 of one per cent (four-tenths of a mill) of the gross receipts of the company (*id.*). The Village of Maywood's share was less than one-half of the total additional receipts anticipated by elimination of the franchise payments. It was asserted by the company that the average residential customer's bill would be affected approximately six cents per month by the proposal (Abst. 30).

Testimony further established the fact that the Maywood franchise ordinance provisions providing for payment to the Village were accepted by the company's predecessor in order to meet the competition of other companies for the gas business involved (Abst. 60-61). Similar utility franchise provisions which provided for annual payments to the municipality have been eliminated by the company from time to time by means of lump sum payments to the municipality. Among examples cited in the record were the Aurora gas franchise involving payment of $63,000 in 1954 (Abst. 58), Wheaton gas and electricity franchise, $160,000 in 1952 (Abst. 59), Chicago Heights $55,000 in 1953 (Abst. 32), Elmhurst $56,000 in 1947, and Joliet $15,000 in 1953 (Abst. 59).

The company has paid lump sums to the Villages of Bellwood and Melrose Park for new franchises eliminating payment provisions similar to those in the Maywood ordinance (Abst. 72). In none of these cases were the rates to consumers in the particular municipality increased to cover the cost to the company of the lump sum payments. The rate schedule here under consideration does not provide for any increase in rates in Bellwood and Melrose Park to cover the lump sum payments recently made and it was admitted that the lump sum payments would not be passed on to the customers.

The company's witness also testified that it was the practice of the company to provide free gas for municipal use in the various municipalities in which it operates. The amount of free gas furnished varies as between municipalities (Abst. 59).

The company made it clear that these proceedings were purely a matter of alleged discrimination. Such discrimination purportedly existed against other consumers in the territory who reside in municipalities which do not receive franchise payments, although no persons purportedly discriminated against have complained (Abst. 54). The Commission proceeding was instituted by the company itself, to change its own rates.

It was not claimed, and there was no effort to show, that the company was not getting a fair return on investment. The evidence further showed that the rates to other consumers would not be reduced if the municipal compensation rider was to go into effect (Abst. 53), and that the rider would have the effect of increasing the gross revenues of the company. It was also admitted that the payments made to the three municipalities by virtue of the franchise ordinances were included as an

operating expense for the purpose of establishing the current rates of the company (Abst. 54).

The Northern Illinois Gas Company operates in 17 Illinois counties. It serves 197 incorporated communities and 39 unincorporated communities. It has a uniform rate schedule for gas service throughout its territory. With the payment of lump sum cash payments to the Villages of Bellwood and Melrose Park for the cancellation of their respective franchise ordinances, the Village of Maywood remained the only municipality served by the company in which compensation is paid to the municipality as a franchise requirement. The company proposes to continue to pay 3% of its receipts to the Village of Maywood if the terms of Rider 7 became effective.

On June 25, 1957 the Commerce Commission entered an order finding that the compensation payments to Maywood had the practical result of unfairly placing upon consumers in other communities the major part of the burden of the compensation paid to Maywood. It further found that an unjust and unreasonable discrimination existed against customers outside of Maywood and that Rider 7 was necessary to remove the discrimination. It concluded that Rider 7 was just and reasonable and should become effective (Abst. 5). The petition for rehearing filed by the Village of Maywood (Abst. 74) was denied on July 24, 1957 (Abst. 6) and the Village appealed to the Circuit Court.

On September 26, 1960, the Honorable William V. Brothers, Judge of the Circuit Court of Cook County, Illinois, entered an order affirming the orders of the Commerce Commission (Abst. 9). An appeal was taken to the Supreme Court of the State of Illinois which affirmed the order of the trial court. The written opinion affirming the order appears *infra*, pp. 5a-11a.

ARGUMENT.

I.

THE ILLINOIS COMMERCE COMMISSION IMPAIRED THE OBLIGATION OF CONTRACT BETWEEN THE VILLAGE OF MAYWOOD AND THE NORTHERN ILLINOIS GAS COMPANY, WHEN IT SHIFTED, BY ORDER, THE BURDEN OF PAYMENT FROM THE COMPANY TO THE RESIDENTS OF THE MUNICIPALITY BY PERMITTING RECAPTURE OF THE FRANCHISE PAYMENTS.

The Federal Constitution forbids the impairment of the obligation of contract by the enactment of state law (Art. I, § 10, cl. 1). The issuance of a state commerce commission order has the binding effect of law. *Mandel Bros.* v. *Chicago Tunnel Term. Co.*, 2 Ill. 2d 205, 210, citing *Arizona Grocery Co. & A.T. & S.F. Ry.*, 284 U.S. 370. Where, as here, the order of the commission did in fact impair the obligation of the contract between the Village and the company, it is null and void, because this contract is of that class which is protected by the Federal Constitution. *Detroit United Railway* v. *Michigan*, 242 U.S. 238; 37 S. Ct. 87, 91; *Cleveland* v. *Cleveland City Ry. Co.*, 194 U.S. 517, 536-37; 24 S. Ct. 756.

The Village of Maywood, Cook County, Illinois, adopted a franchise ordinance on November 22, 1900 (Abst 87-99) granting "The Municipal Gas Company, its successors, lessees and assigns" the right to lay mains and pipes, for the sale of illuminating gas, through and along all the ways and byways within the Village limits (Par. 1, Abst. 88). The price for this franchise was 3% of the gross receipts (Par. 13, Abst. 94).

The successors and assigns of the Municipal Gas Company in an unbroken line of succession were: The Cicero Gas Company (1901); The Northwestern Gas, Light and Coke Company (1902), which consolidated with the Public Service Company of Northern Illinois (1913); Commonwealth Edison Company by merger (1952); and to the present franchise holder, Northern Illinois Gas Company, by assignment (1954) (Abst. 23-24).

Thus, the benefits of the franchise ordinance have been accepted and used by the present recipient, the Northern Illinois Gas Company. However, the year following merger the company filed a rate schedule with the Commission, adding 3% to the gross bill, "which shall enable the company to recover from such customers the amount paid to the municipality as compensation under the franchise ordinance" (Abst. 82). The Commission granted the increase (Abst. 5-6).

In so doing, the Commission held that: "The Village of Maywood is the only municipality served by the Company which pursuant to franchise ordinance requires that the Company pay to the municipality a percentage of its revenues * * *" (Par. 7, Abst. 4). These payments have grown from an "inconsiderable sum in earlier years to $20,571.29 for the year 1954" (*id.*). These payments "constitute an operating expense" (Par. 8, Abst. 3). The company's rates "are uniform throughout its main service area * * *" (Par. 9, *id.*).

The Commission further held that these payments have "the practical result of unfairly placing upon the gas consumers in other communities the major part of the burden of the * * * compensation * * * paid to Maywood" (Par. 10, *id.*). Admittedly, the payment to Maywood is

less than one-fortieth of one per cent of the gross receipts (Abst. 49). When the payment is passed on to the consumers, the gross is added to the company's income (Abst. 39). And, admittedly, the added 3% does not affect the rate schedule (Abst. 53).

The company admitted the franchise ordinance was a valid, binding contract (Abst. 31). It also conceded that it was assignee of this ordinance, and that it "recognized [its] obligation and paid accordingly" (Abst. 37). Nevertheless, the Commission permitted the company by order to evade its obligation, by passing it on to the residents, the very people for whose benefit it was granted in the first instance.

The Village of Maywood, as the contracting party, represents its consumers, and is the proper party to challenge the abrogation of the contract obligation of the company. *Wright* v. *Central Kentucky Natural Gas Co.*, 27 U.S. 537; 56 S. Ct. 578, 580.

There can, of course, be no question but that the action of the Illinois Commerce Commission, by issuing its order shifting the onus of the 3% payment from the company to the resident customers impaired the obligation of this contract. The order

> "which deprives one of the benefit of a contract, or adds new duties or obligations thereto, necessarily impairs the obligation of contract, and when the state or municipal legislation which has the effect to impair contract rights by depriving parties of their benefit, and make requirements which the contract did not impose upon them, a case is presented for the jurisdiction of this court." *Northern P. R. Co.* v. *Minnesota ex rel. Duluth*, 208 U.S. 583; 28 S. Ct. 341, 343.

In the case at bar the company agreed to pay the Village of Maywood for the use of its streets and the right to sell gas to the residents (Par. 1, Abst. 87). The consideration to be paid was three per cent (3%) of its gross receipts from customers in the Village limits (Par. 13, Abst. 98). From 1921 to and including the present, those payments have been made by reason of the Village permitting continued use of its streets for the company to reach the resident customers (Abst. 31, 37). Without a change of circumstance, without a concomitant obligation, service or detriment, the company has evaded its responsibility under the contract. Having done so it has unconstitutionally impaired the obligation it undertook in exchange for the franchise benefits it has enjoyed continuously since 1900, and which it continues to enjoy to this moment.

Especially is this so when the company admits that the additional revenue is unrelated to its rate structure (Abst. 53); where it admits that its recapture of this payment will be gross profit to the company (Abst. 39); where the record fails to show any discrimination whatever; where the record fails to show a lack of uniform rate; where the record fails to show the relative cost of supplying gas to remote, rural, developing areas, *vis-a-vis*, mature, urban, populous and well integrated areas (*cf., State v. Public Service Commission*, 245 S.W. 2d 851, 854-55 (Mo., 1952).

The impairment of the obligation of this contract by shifting the burden of payment from the company to the beneficiaries of the contract violates the Federal Constitution. *Northern P. R. Co. v. Minnesota ex rel. Duluth*, 208 U.S. 583; 28 S. Ct. 341, 343.

CONCLUSION.

The franchise contract ordinance of the Village of Maywood has been impaired by the Commission's order permitting the company to evade its obligation of franchise payment. Therefore, the petitioner prays that a writ of certiorari issue to the court below; that petitioner be heard in brief and argument; and, that the judgment be reversed with directions to vacate the order of the Illinois Commerce Commission.

Respectfully submitted,

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APPENDIX.

Order entered by the Illinois Commerce Commission in Cause No. 43553 on the 25th day of June, 1957:

By the Commission:

On July 26, 1956, Northern Illinois Gas Company (hereinafter referred to as the "Company") filed with the Commission a rate schedule sheet, Ill. C. C. No. 9, Schedule G, Original (Revised) Sheet No. 27, Rider 7 (hereinafter referred to as "Rider 7"). Rider 7 provides in substance that the Company's standard charges for gas service shall be increased in any municipality to which the Company is required by franchise ordinance to pay a percentage of its revenues for gas service furnished to customers therein, the amount of the additional charge to be determined by the amount of municipal compensation paid to any municipality. Rider 7 in form is of general application but at the time of filing it would affect and was stated to affect only those customers receiving gas service in the Village of Maywood by increasing the rates of such customers by 3% to match the amount of the franchise payment to such municipality.

Prior to this proceeding, on August 31, 1955, the Company filed with the Commission a rate schedule sheet, Ill. C. C. No. 9, Schedule G, Original Sheet No. 27, Rider 7, proposed to go into effect on October 1, 1955. Public notice thereof was duly made by publication. This rate schedule sheet was suspended until January 27, 1956 by order of the Commission dated September 13, 1955, and resuspended until July 27, 1956 by order dated January 18, 1956. Hearings were held on such rate schedule sheet in Case No. 42755 on October 4, 1955, November 8, 1955,

December 12, 1955, January 11, 1956 and July 16, 1956, at which time the case was marked "heard and taken." Appearing in Case No. 42755 were the municipalities of Bellwood, Melrose Park and Maywood and the Bellwood Industrial Executives Committee. The case having been settled as to Bellwood and Melrose Park, Case No. 42755 was by order dated July 17, 1956 dismissed without prejudice, and, by stipulation between the Company and the Village of Maywood, the Rider 7 involved in this proceeding was filed by the Company as hereinabove stated. Also by stipulation of the Company and the Village of Maywood, the entire record in Case No. 42755 was made a part of the record herein. The Rider 7 involved in this proceeding is in all respects the same as the original rate schedule sheet in Case No. 42755, except that it was noted on said original rate schedule sheet that it would be then applicable to the municipalities of Bellwood, Melrose Park and Maywood and in Rider 7 involved in this proceeding such references to Bellwood and Melrose Park have been eliminated.

After said dismissal of Case No. 42755, Rider 7, having been filed, was suspended until December 25, 1956 by order in this case dated August 16, 1956 and resuspended until June 25, 1957 by order in this case dated December 19, 1956. A hearing was held before a duly authorized Examiner of the Commission on September 18, 1956, at which, pursuant to the stipulation hereinabove referred to, the entire record of Case No. 42755 was on motion made a part of the record in this case. This hearing was continued to September 25, 1956, and then to October 24, 1956, at which time the Commission received oral argument. At said hearings appearances were entered for Respondent, Northern Illinois Gas Company, and for the Village of Maywood.

The Commission having examined the Company's rate schedules and the proposed Rider 7, and all of the evidence introduced in this proceeding, and having examined the briefs and heard the statements and arguments of counsel, and being fully advised in the premises, is of the opinion and finds that:

1. The Commission has jurisdiction of all of the parties in and the subject matter of this proceeding;

2. Northern Illinois Gas Company is a corporation organized and existing under the laws of the State of Illinois and is a public utility engaged in the business of supplying gas to the public in the northern area of Illinois, outside the City of Chicago, and as such is subject to the provisions of an act entitled "An Act concerning public utilities," as amended, and to the jurisdiction of the Commission thereunder;

3. The recitals hereinbefore set forth are supported by the evidence and are hereby adopted as findings of fact;

4. On July 26, 1956, the Company filed with the Commission a rate schedule sheet, Ill. C. C. No. 9, Schedule G, Original (Revised) Sheet No. 26, Rider 7, proposed to become effective August 27, 1956. Said rate schedule sheet was accompanied by an appropriate supplemental statement in accordance with the rules of the Commission;

5. Due notice of the filing of Rider 7 was duly published in 91 newspapers in the territory served by the Company;

6. Rider 7 provides that the Company's standard charges for gas service shall be increased in any municipality to which the Company is required by franchise ordinance to pay a percentage of its revenues for gas service furnished to cus-

tomers therein. The amount of the additional charge is determined by the amount of municipal compensation paid to any municipality;

7. The Village of Maywood is the only municipality served by the Company which pursuant to franchise ordinance requires that the Company pay to the municipality a percentage of its revenues for gas service furnished to customers therein. Such payment is provided for by an indeterminate franchise ordinance from the Village to the Municipal Gas Company effective in the year 1900, which ordinance by successive assignments has passed to Northern Illinois Gas Company. The amount of the payment provided is 3% of the gross receipts of the Company from the sale of gas in the Village of Maywood. Payments to Maywood have grown from an inconsiderable sum in earlier years to $20,571.59 for the year 1954;

8. Such payments to the Village of Maywood constitute an operating expense, and as such are an element of the rate paid by the Company's customers;

9. The Company's rates for gas service are uniform throughout its main service area, in which Maywood is located;

10. The effect of making municipal compensation payments to the Village of Maywood as hereinabove described has the practical result of unfairly placing upon the gas consumers in other communities the major part of the burden of the municipal compensation required to be paid to Maywood;

11. An unjust and unreasonable discrimination exists against customers of the Company other than those within the Village of Maywood, arising from the payment of municipal compensation to Maywood, and Rider 7 is necessary to remove said discrimination;

12. Rider 7 is just and reasonable, and should become effective with meter readings taken on and after July 26, 1957.

It is therefore ordered by the Illinois Commerce Commission that its order dated August 16, 1956, suspending Rider 7, and its order dated December 19, 1956, resuspending Rider 7, be and the same are hereby vacated and set aside.

It is further ordered that Rider 7 shall become effective with meter readings taken on and after July 26, 1957, and that the Company is hereby directed to file forthwith with the Commission a new rate schedule sheet bearing such effective date.

It is further ordered that all objections and motions made in these proceedings which have not heretofore been disposed of be, and the same are hereby, disposed of and resolved consistently with the ultimate conclusions herein contained.

By order of the Commission at Chicago, Illinois, this 25th day of June, 1957.

(Signed) Frederick B. Resag,
(Seal) Secretary.

The Village of Maywood, Appellant, v. Illinois Commerce Commission *et al.*, Appellees.

Mr. Justice Solfisburg delivered the opinion of the court:

This case began in 1955 when the Northern Illinois Gas Company, hereinafter referred to as the company, filed a proposed rate change with the Commerce Commission. The rate was suspended pending a hearing. The village

of Maywood, hereinafter referred to as Maywood, intervened, and following hearings the Commission entered an order finding that the proposed rate change was just and reasonable and should become effective. On appeal to the circuit court of Cook County, the order of the Commission was affirmed. Maywood has appealed directly to this court to review the judgment of the circuit court.

The rate change granted originally involved a 3% increase in the gas rates for consumers in the villages of Maywood, Bellwood and Melrose Park, which increase was requested to reimburse the company for the expense of franchise payments made to these villages. The company was operating in these villages under franchise ordinances providing for payment by the company to the villages of an annual franchise payment amounting to 3% of the gross receipts of the company from its operations in said villages. While the present proceedings were pending before the Commission, the company made lump sum payments to the municipalities of Bellwood and Melrose Park, which had the effect of eliminating the annual franchise payments to these municipalities. The company then withdrew its original rate schedule and filed a revised schedule applicable only to the village of Maywood. This schedule continued to call for an additional charge of 3% to be assessed against the users of gas in the village of Maywood to compensate the company for the annual 3% franchise payment which it was compelled to make to the village under the terms of the franchise ordinance.

The evidence before the Commission showed that the franchise ordinance had been adopted by Maywood in 1900, prior to the creation of a regulatory commission to supervise the service rendered and the rates charged

by utility companies. At that time there was considerable competition on the part of utility companies to secure long-term franchises for providing gas service within municipalities, and, in order to obtain the right to operate in Maywood, the predecessor of the present company accepted the franchise ordinance, and payments under the ordinance have been made since 1922. It appeared from the evidence that it was not the usual practice to include such percentage provisions in franchise ordinances although there were several instances where this was done. In the early years during which the company operated under this ordinance, the franchise payments were quite small, but in recent years, due to the increased use of gas, the amount of the franchise payments has greatly increased, so that in 1955, at the time of the hearings before the Commission, the payment to Maywood amounted to almost $25,000 annually. The company's gross receipts from all of its operations in the entire area which it served, amounted to more than $67,000,000. The annual payment to Maywood, therefore, represented a very small fraction of the total amount of revenue derived from the company's entire operation. A witness for the company testified at the hearing that if the proposed rate schedule was approved and the company was permitted to recapture this payment, the additional expense incident to the receipt of the income, such as the utility tax and the Federal income tax, would reduce the amount thus recaptured by more than 50%. This testimony referred to the amounts paid to the three villages which were originally involved, since the hearing was held prior to the lump sum payments to the other villages, and that testimony showed that the net amount of revenue which the company would derive from the increased rate, if applied

to consumers in all three municipalities, would amount to only about 1/40th of 1% of the company's entire revenue.

The company relies upon the case of *City of Elmhurst* v. *Western United Gas and Electric Co.*, 363 Ill. 144. In that case, a rate schedule previously had been approved by the Commission which authorized the company to add to its uniform charges for gas service in certain cities a percentage differential sufficient to reimburse the company for the annual franchise payments made to the municipalities. The city of Elmhurst, one of the cities which collected franchise payments from the company, filed a complaint with the Commerce Commission in which it charged that the rate was unjust and discriminatory insofar as it permitted the recapture of the franchise payments from users of gas in the communities to which franchise payments were made. We held that franchise payments were properly chargeable as an element of the cost of operation which should be borne by the consumer of the utility's product, and held that it would be unjust to spread the burden of an annual franchise payment over the entire area served by the utility. We specifically stated that such franchise payments should be borne by the company's consumers residing within the municipality which received the annual payment, and held that a rate providing for such payment was not unjust or discriminatory.

In the present case, Maywood seeks to distinguish the *Elmhurst* case by arguing that in that case the Commission had previously approved a rate permitting recapture of the franchise payments, and that therefore it should be presumed that the uniform rate applicable to cities other than the cities to which franchise payments

were made was lower than it would have been otherwise, since the Commission must have taken into account the increased revenue derived by the company from the recapture of the franchise payments from certain municipalities. In our opinion this assumption is unjustified. Rate making is not a scientifically exact procedure, and the fixing of a fair and reasonable rate involves a question of sound business judgment rather than a mathematical or legal formula. (*Iowa-Illinois Gas and Electric Co.* v. *Commerce Com.* 19 Ill.2d 436; *Public Utilities Com.* v. *Springfield Gas and Electric Co.* 291 Ill. 209.) The exact effect of minor items of expense and revenue such as those involved in the franchise payments in the *Elmhurst* case and in the present case may not be discernible in the ultimate rate structure of the company. It is settled that it is within the power of the Commission to authorize a change in rates without a full hearing and examination to determine a fair rate on the fair value of the utility's property. (*Produce Terminal Corp.* v. *Commerce Com. ex rel. Peoples Gas Light and Coke Co.* 414 Ill. 582, 595.) It was therefore not necessary in the present case to reexamine the entire rate structure of the company.

Maywood also contends that since the *Elmhurst* case originated as a complaint proceeding, it must be distinguished from the present case which originated by the filing of a rate change by the company. We are unable to agree. If a rate is unjust and discriminatory, it may be corrected by a rate hearing initiated by the company as well as in a complaint proceeding initiated by a consumer.

Maywood argues that the amount involved here is so inconsequential that no adjustment should be made. We can not subscribe to a doctrine which would hold that

discrimination cannot be corrected because it is small in amount. The issue in such cases is whether there is unjust discrimination, regardless of amount. Our holding in *Elmhurst* makes it clear that a rate is unjust when it does not impose the burden of franchise payments on users in the community which receives the payment.

Finally, Maywood contends that the *Elmhurst* case held only that a rate schedule permitting recapture was not discriminatory and did not hold that a schedule not providing for such recapture was discriminatory. Because of the manner in which the question was presented in *Elmhurst*, the precise holding of that case was limited to a holding that the rate structure involved therein was not discriminatory. However, the necessary implications of *Elmhurst* and the language used in that case make it clear that the burden of franchise payments should be borne by communities deriving the benefit of such payments. The case held that recapture of the payments from the consumers in such communities was proper. Since that is precisely with the rate in the present case accomplishes, we consider *Elmhurst* to be controlling here.

Maywood has cited cases from other jurisdictions and has referred to decisions of regulatory bodies in other States. Since in our opinion this case is governed by our holding the *Elmhurst* case, and since we are satisfied that our holding in that case was correct, we do not find it necessary to discuss the authorities from other jurisdictions.

There was little, if any, dispute as to the facts in this case, and the findings of the Commission are amply supported by the evidence. It is the rule that orders of the Commerce Commission are presumed to be valid and can

be set aside on judicial review only if the findings are manifestly against the weight of the evidence or the order is directly contrary to some established rule of law. *Village of Apple River* v. *Commerce Com.* 18 Ill.2d 518; *Commerce Com. ex rel. Lumaghi Coal Co.* v. *Chicago and Eastern Illinois Railway Co.* 332 Ill. 243.

The order of the Commission was in accord with the established rule of law as set forth in the *Elmhurst* case. The order of the circuit court of Cook County affirming the order of the Commission is therefore affirmed.

Order affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 760

VILLAGE OF MAYWOOD, a municipal corporation,
Petitioner,

v.

ILLINOIS COMMERCE COMMISSION and
NORTHERN ILLINOIS GAS COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents, the Illinois Commerce Commission and Northern Illinois Gas Company (Northern Illinois), pray that this Court deny the Writ of Certiorari sought by Petitioner, the Village of Maywood, Illinois, to review the judgment of the Supreme Court of Illinois rendered November 30, 1961 in *Village of Maywood v. Illinois Commerce Commission*, 23 Ill. 2d 447, 178 N.E. 2d 345.

Opinions Below

The judgment of the Supreme Court of Illinois affirmed a judgment of the Circuit Court of Cook County, Illinois, (Abst. 9) which, in turn, had affirmed an order of the Illinois Commerce Commission. (Abst., 1-6) permitting Northern Illinois' Standard Contract Rider 7 to become

effective as part of Northern Illinois' rate schedule for gas public utility service. This Rider provides: "Where the Company pays to a municipality, under a franchise ordinance, a percentage of its revenues for gas service furnished to customers therein, charges for service under the rates provided in this Schedule shall be increased by a percentage which shall enable the Company to recover from such customers the amount paid to the municipality as compensation under the franchise ordinance." (Abst. 7)

Jurisdiction

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. Section 1257(3). Respondents believe that this Court does not have jurisdiction because this case does not necessarily involve a decision which denied a right claimed by Petitioner under the Constitution of the United States and also because the right claimed under the Constitution was not adequately raised below. These matters are discussed at Argument, Parts I and III, respectively.

Question Presented

If this Court has jurisdiction, the question presented is whether or not the Illinois Commerce Commission may, in a rate-making proceeding under the Illinois Public Utilities Act, permit a public utility to recover from its customers in a municipality the franchise fee paid by the public utility under the municipality's franchise ordinance where the ordinance itself is silent on the subject (Abst. 87-104) and the public utility has a uniform rate schedule for a territory which includes 197 municipalities (Abst. 25, 26).

Petitioner's only contention in this Court is that the order of the Illinois Commerce Commission constitutes an impairment of a contract obligation under the franchise

ordinance, in violation of Article 1, Section 10, Clause 1 of the Constitution of the United States.

Statement of Facts

The facts as set forth in the Petition are substantially correct. However, it should be noted: (i) that Northern Illinois is making and proposes to continue making its required payments to the Village of Maywood under the franchise ordinance (Abst. 31, 52), (ii) that the franchise ordinance is silent on the question of where Northern Illinois is to obtain the funds to make its franchise payments to the Village of Maywood (Abst. 87-104) and (iii) that there is nothing in the record which indicates that, at the time the Muncipal Gas Company, predecessor in interest to Northern Illinois, obtained the Maywood franchise, it was furnishing gas service in any other municipality (Abst. 31).

Argument

I. This Court does not have jurisdiction because Petitioner's claim can be disposed of entirely as a matter of state contract law.

Northern Illinois recognizes and is meeting its obligations under the franchise ordinance of the Village of Maywood. The payments required to be made under the ordinance are being made and will continue to be made (Abst. 31, 52). They are not affected by the order of the Illinois Commerce Commission. This is undisputed.

The franchise ordinance says nothing about the source of funds to be used for the payment of the franchise fees (Abst. 87-104). The Village does not contend that this matter is covered by any other evidence.

Petitioner's claim in this Court that the franchise ordinance has been impaired can be disposed of entirely on the ground that the ordinance does not embrace the source of funds to be used by the public utility for the payment of the franchise fees. *Grand Trunk Ry. v. Railroad Comm'n.*, 221 U.S. 400, 403-04 (1911).

Moreover, there is nothing in the record to indicate that, at the time the Maywood franchise was granted to the Municipal Gas Company, predecessor in interest to Northern Illinois, that company was furnishing gas service in any community other than Maywood. Clearly, if the Village of Maywood was the only community served by the public utility, there would be no source of funds for the franchise fees other than the revenues received from the public utility's customers in the Village of Maywood. This is a further basis for concluding that the order of the Illinois Commerce Commission cannot be said to have impaired the franchise ordinance.

On either of the foregoing grounds there is an adequate, independent basis in state contract law on which the court below could have disposed of Petitioner's claim and this Court is therefore without jurisdiction. *Johnson v. Risk*, 137 U.S. 300, 306-09 (1890); *Lynch v. New York*, 293 U.S. 52 (1934).

II. The Commission's order can override the franchise ordinance without violating the Constitution of the United States.

Even if it is assumed that the franchise ordinance forbids Northern Illinois to recover the franchise payments from its customers in the Village of Maywood, the State of Illinois, acting through a rate-making order of the Illinois Commerce Commission under the Illinois Public Utilities Act, *Ill. Rev. Stat.*, c. 111⅔, §§35-38, may override this aspect of the ordinance and permit Northern Illinois to add a charge for the franchise payments to its bills for gas service rendered in the Village of Maywood. This order of the Illinois Commerce Commission is an exercise by the State of Illinois of its police power which the franchise ordinance could not, in advance, defeat. *Milwaukee Elec. Ry. and Light Co. v. Railroad Comm'n.*, 238 U.S. 174, 180-84 (1914); *Midland Realty Co. v. Kansas City Pow. & Light Co.*, 300 U.S. 109, 113-14, *rehearing den.*, 300 U.S. 687 (1937), since it is well settled that the Illinois Commerce Commission, acting under the Illinois Public Utilities Act, may change the rates set by a municipal franchise ordinance even if the franchise ordinance was enacted and accepted before the enactment of the Illinois Public Utilities Act. *Public Utilities Comm'n. v. Quincy*, 290 Ill. 360, 362-70, 125 N.E. 374, 375-78 (1919); *Hoane v. Chicago & Oak Park Elec. R.R.*, 294 Ill. 413, 417-22, 128 N.E. 587, 589-91 (1920).

III. This Court does not have jurisdiction because Petitioner's alleged federal right was not adequately raised below.

Petitioner's claim that the Illinois Commerce Commission's order impairs the obligation of Petitioner's franchise ordinance in violation of Article 1, Section 10, Clause 1 of the Constitution of the United States was not adequately raised in the courts below and therefore cannot form the basis for this Court's jurisdiction of this case.

This Court does not have jurisdiction to pass upon the alleged denial of a federal right in a state court if the claim of federal right was not raised in the state court in accordance with the reasonable requirements of the state's legal procedure. *Louisville and Nashville R.R. v. Woodford*, 234 U.S. 46, 51 (1914).

There are no detailed pleadings in Illinois practice either on appeal from a decision of the Illinois Commerce Commission to a Circuit Court or on the subsequent appeal from the decision of the Circuit Court to the Supreme Court of Illinois. While the briefs in the Supreme Court of Illinois are not part of the record before this Court, it may be proper to refer to them to ascertain whether or not the federal right was properly asserted below.

In Paragraph 5 of its petition for rehearing before the Illinois Commerce Commission, Petitioner did say that Northern Illinois' Rider 7 would impair the terms of the franchise ordinance in violation of Article 10, Section 1, Clause 1 of the Constitution of the United States and in violation of Article II, Section 14 of the Constitution of Illinois. (Abst. 76). This is the only specific reference to the contracts clause of the Constitution of the United States in the entire record and in the briefs before the Supreme Court of Illinois. No briefs were filed in the Circuit Court of Cook County.

At pages 3 and 28 and 29 of Petitioner's brief before the Supreme Court of Illinois, references are made to a claimed impairment of a contractual obligation but no citations are given and the references could as easily be deemed to be addressed to the proper interpretation of the franchise ordinance as to a constitutional argument. Moreover, the Constitution of Illinois forbids the impairment of contracts by the state and Petitioner's impairment of contract argument, if such an argument were made, could as well have been under the Constitution of Illinois as under the Constitution of the United States. As this Court stated in *Lynch v. New York*, 293 U.S. 52, 54 (1934), "... jurisdiction cannot be founded upon surmise."

Rule 39 of the Supreme Court of Illinois, in relevant part, provides:

> Briefs. . . .
>
> II. The Points and Authorities shall consist of the propositions relied upon in support of the appeal with citation of authorities. . . .
>
> IV. The Argument shall be limited to the points made and cases cited in the Points and Authorities, and in the sequence in which the points are made. A point made but not argued may be considered waived. . . .
>
> No alleged error or point not contained in the brief shall be raised afterwards, either by reply brief or in oral or printed argument or on petition for rehearing. . . . *Ill. Rev. Stat.* c. 110, 101.39.

Petitioner's claim under the contracts clause of the Constitution of the United States was not mentioned in the Points and Authorities section (pp. 5-6) of its brief before the Supreme Court of Illinois. Under Rule 39, as set forth above, Petitioner was precluded from thereafter raising the

claim in that court either on oral argument or on petition for rehearing, and the court was precluded from considering it. *People ex rel. Carpentier v. Treloar*, 13 Ill.2d 596, 601, 150 N.E.2d 624, 626 (1958).

The opinion of the Supreme Court of Illinois makes no mention of the impairment of contract argument. Had the argument been fairly presented to the Supreme Court of Illinois it is reasonable to believe that it would have received attention. Skilled lawyers represented Petitioner. They could, with ease, have presented openly the constitutional claim they now make. They did not do so.

Surely Petitioner's presentation below of its claimed federal right was not under these circumstances adequate to give this Court jurisdiction. *Lyon Oak Water Users' Ass'n. v. Railroad Comm'n.*, 269 U.S. 354, 356-59 (1926); *Halbert v. Chicago*, 202 U.S. 275, 280 (1906).

IV. The decision of the Supreme Court of Illinois is correct as a matter of rate making.

The decision of the Supreme Court of Illinois in approving the decision of the Illinois Commerce Commission is correct as a matter of rate making. Where a municipality imposes an annual franchise charge upon a public utility and the amount of the charge is not passed on to the public utility's customers in that municipality, an illegal discrimination against customers outside the municipality results if the public utility has a uniform rate schedule as does Northern Illinois. *Elmhurst v. Western United Gas and Elec. Co.*, 363 Ill. 144, 1 N.E. 2d 489 (1936); *Ogden City v. Public Service Comm'n.*, 123 Utah 443, 260 P.2d 754 (1953); *Scottsbluff v. United Tel. Co.*, 171 Neb. 229, 106 N.W. 2d 12 (1960). This was the sole issue below; it is not raised by the Petition for a Writ of Certiorari.

Conclusion

For reasons stated above, Respondents pray that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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